Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HELEN EDWARDS,
CHRISTOPHER EDWARDS,
Petitioners,

v.

ACADIA REALTY TRUST, INC.,
WELLS FARGO GUARD SERVICE, INC.
OF FLORIDA,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Mark E. Tietig,
Counsel of Record
Lisa Kuhlman Tietig
Co-Counsel
Tietig & Tietig, P.A.
6065 South Tropical Trail
Merritt Island, FL 32952
Telephone: (321) 452-9944

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36 pg

Questions Presented

1. Regarding a claim under 42 U.S.C. § 1981 by a white husband and wife for retaliation for opposition to unlawful racial discrimination where a white security guard allegedly racially discriminated against groups of young black children in a place of public accommodation, must the plaintiffs prove that the racial discrimination complained of actually occurred, or is the plaintiffs' reasonable, good faith belief that unlawful racial discrimination occurred enough to protect the plaintiffs from retaliation for their opposition to the alleged discriminatory conduct?

2. Does a white person have standing under 42 U.S.C. § 1981 where the retaliation against the white person was not based upon the white person's own race, but upon the white person's opposition to racial discrimination against black people?

3. In a claim under 42 U.S.C. § 1983 for a violation of First Amendment free speech rights committed by a private corporation's employee acting under color of state law, must the plaintiff prove that the conduct that violated the plaintiff's rights was pursuant to a custom, policy, or practice of the defendant private corporation employer?

4. Are a husband and wife's constitutional rights to free speech and association violated where the husband and wife are both ejected from a place of public accommodation after the wife's peaceable vocalization of the couple's reasonable, good faith opposition to racial discrimination against a group of young, African-American children, and where the basis for the ejectment is the husband's and wife's association with the group of young African-American children?

5. Are a husband's constitutional rights to free speech and association violated where the husband is ejected from a place of public accommodation after the wife's peaceable vocalization of their reasonable, good faith opposition to racial discrimination against a group of young, African-American children, and where the basis for the husband's ejectment is the husband's association with his wife?

6. Regarding claims of violation of equal protection rights where white people suffer retaliation for opposing unlawful racial discrimination in a place of public accommodation, whether the class of similarly situated people is people in the place of public accommodation who witness the discrimination but do not outwardly oppose the discrimination?

TABLE OF CONTENTS

Questions Presented i

Table of Cited Authorities v

Opinions Below 1

Jurisdictional Statement 1

Constitutional Provisions, Statutes, and Ordinances Involved 2

Statement of the Case 2

Statement of Facts 3

Argument and Authorities 7

I. **CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH OTHER CIRCUIT COURTS' HOLDINGS IN ANALOGOUS CONTEXTS THAT REASONABLE, GOOD-FAITH OPPOSITION TO RACIAL DISCRIMINATION IS PROTECTED FROM RETALIATION, EVEN IF SUCH BELIEF IS MISTAKEN.** 7

II. **BECAUSE THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH THE HOLDINGS OF THIS COURT AND OF OTHER CIRCUIT COURTS, THIS COURT SHOULD GRANT CERTIORARI TO OVERTURN THE LAW OF THE ELEVENTH CIRCUIT THAT A WHITE PERSON DOES NOT HAVE STANDING UNDER 42 U.S.C. § 1981 FOR A CLAIM OF RETALIATION FOR OPPOSING**

RACIAL DISCRIMINATION AGAINST BLACK PEOPLE WHERE THE RETALIATION IS NOT BASED UPON THE WHITE PERSON'S OWN RACE. . . . 11

III. **CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH THE RULINGS OF THIS COURT REGARDING WHETHER PRIVATE ENTITY STATE ACTORS SHARE THE SAME IMMUNITIES AS MUNICIPALITIES.** . . . 12

A. No custom or policy need be established to hold liable a private entity in the role of state actor under 42 U.S.C. § 1983. 13

B. Petitioners have adduced sufficient evidence to establish Respondents' custom or policy. 16

IV. **CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DISMISSAL OF PETITIONERS' FREE ASSOCIATION CLAIMS UNDER THE FIRST AMENDMENT AND 42 U.S.C. § 1983 CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT; OR, ALTERNATIVELY, THE ELEVENTH CIRCUIT HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW REGARDING FIRST AMENDMENT RIGHTS OF FREE ASSOCIATION THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.** 19

V. **CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT IN DISMISSING PETITIONERS' EQUAL PROTECTION CLAIMS.** 22

Conclusion 23

Table of Cited Authorities

Cases

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970). 9

Alizadeh v. Safeway Stores, Inc.,
802 F.2d 111 (5th Cir. 1986). 12

Aman v. Cort Furniture Rental Corp.,
85 F.3d 1074 (3d Cir. 1996) 8

American Manufacturers Mutual Ins. Co. v. Sullivan,
526 U.S. 40 (1999) 17

Buckner v. Toro,
116 F.3d 450 (11th Cir. 1997) 13,14,15

Buettner v. Arch Coal Sales Co., Inc.,
216 F.3d 707 (8th Cir. 2000) 8

City of Canton, Ohio v. Harris,
489 U.S. 378 (1989) 18

Clark County School District v. Breeden,
532 U.S. 268 (2001). 8

DeMatteis v. Eastman Kodak Co.,
511 F.2d 306 (2d Cir. 1975) 11

Dennis v. Sparks,
449 U.S. 24 (1980) 18

Des Vergnes v. Seekonk Water Dist.,
601 F.2d 9 (1st Cir. 1979). 11

Disabled in Action of Metropolitan New York v. Hammonds,
202 F.3d 110 (2nd Cir. 2000) 17

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) 9

Edwards v. Acadia Realty Trust, Inc.,
141 F. Supp. 2d 1340 (M.D. Fla. 2001) .1, 13

Fiedler v. Marumsco Christian Schl.,
631 F.2d 1144 (4th Cir. 1980) 12

George v. Pacific-CSC Work Furlough,
91 F.3d 1227 (9th Cir. 1996) 17

Goldstein v. Chestnut Ridge Vol Fire Co.,
218 F.3d 337 (4th Cir. 2000) 17

Goodman v. Lukens Steel Co.,
482 U.S. 656 (1987) 9

Groom v. Safeway Inc.,
991 F. Supp. 987 (W.D. Wa. 1997) . . 13, 15

*Hamner v. St. Vincent Hosp. &
Health Care Ctr., Inc.*,
224 F.3d 701 (7th Cir. 2000) 8

Harvey v. Harvey,
949 F.2d 1127 (11th Cir. 1992) 13, 15

Higgins v. New Balance Athletic Shoe, Inc.,
194 F.3d 252 (1st Cir.(Me.), 1999) 8

Howell v. Evans,
922 F.2d 712 (11th Cir. 1991) 15

Jones v. Preuit & Mauldin,
851 F.2d 1321 (11th Cir. 1988) 15

Lansing v. City of Memphis,
202 F.3d 821 (6th Cir. 2000) 17

Liotta v. National Forge Co.,
629 F.2d 903 (3d Cir. 1980). 11

Little v. United Technologies,
103 F.3d 956 (11th Cir. 1997). 11,12

Lloyd Corporation, Ltd., v. Tanner,
407 U.S. 551 (1972) 17

Love v. RE/MAX of Am., Inc.,
738 F.2d 383 (10th Cir. 1984). 8

Maynard v. City of San Jose,
37 F.3d 1396 (9th Cir. 1994) 12

McDonald v. Santa Fe Trail Transp. Co.,
427 U.S. 273 (1976) 9

Messman v Helmke,
133 F.3d 1042 (7th Cir. 1998) 17

Monell v. Department of Social Serv.,
436 U.S. 658 (1978) 13, 14

Patrick v. Miller,
953 F.2d 1240 (10th Cir. 1992). 12

Perkins v. Londonderry Basketball Club,
196 F.3d 13 (1st Cir. 1999) 17

Pettway v. American Cast Iron Pipe Co.,
411 F.2d 998 (5th Cir. 1969) 8

Richardson v. McKnight,
521 U.S. 399 (1997) 13, 14, 15

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 20, 21

Robinson v. Shell Oil Co.,
519 U.S. 377 (1997) 10

Ross v. Communications Satellite Corp.,
759 F.2d 355 (4th Cir. 1985) 8

Standard v. A.B.E.L. Services, Inc.,
161 F.3d 1318 (11th Cir. 1998) 8

Sullivan v. Little Hunting Park,
396 U.S. 229 (1969) 9, 11

Sumner v. United States Postal Service,
899 F.2d 203 (2d Cir. 1990)) 8

Taylor v. Plousis,
101 F. Supp. 2d 255
(D. N.J. 2000) 13, 15

Taylor v. Runyon,
175 F.3d 861 (11th Cir. 1999) 8

Town of Hallie v. City of Eau Claire,
471 U.S. 34 (1985) 14

Trent v. Valley Electric Assn. Inc.,
41 F.3d 524 (9th Cir. 1994) 8

Winston v. Lear-Seigler, Inc.,
558 F.2d 1266 (6th Cir. 1977) 12

Wyatt v. Cole,
504 U.S. 158 (1992) 15

Statutes and Court Rules

U.S. Const., amend. 1 2

U.S. Const., amend. 14 2

28 U.S.C. 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. § 1343 2

42 U.S.C. § 1981 . . . . . *Passim*

42 U.S.C. § 1982 2

42 U.S.C. § 1983 . . . . . *Passim*

42 U.S.C. § 1985(3) 2

42 U.S.C. § 1986 2

42 U.S.C. § 2000e-3 . . . . . 8, 9

Rule 10 U.S. Sup. Ct. 16

Rule 12 Fed. R. Civ. P. 2

Rule 56 Fed. R. Civ. P. 2

Opinions Below

The Report and Recommendation of the Magistrate Judge to the United States District Court for the Middle District of Florida recommending the granting in part of Respondents' Motions to Dismiss (A-37); the Order of the United States District Court for the Middle District of Florida granting in part Respondents' Motions to Dismiss (A-3); the District Court's Order granting Respondents' Motions for Summary Judgment and denying Petitioners' Motions for Summary Judgment (published as *Edwards v. Acadia Realty Trust, Inc.*, 141 F. Supp. 2d 1340 (M.D. Fla. 2001)) (A-21); the District Court's Order denying Petitioners' Motion to Alter or Amend the Order granting Defendants' Motions for Summary Judgment and denying Petitioners' Motions for Summary Judgment (A-63); the Order of the United States Court of Appeals for the Eleventh Circuit affirming the trial court (A-1); and, the Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioners' Motion for Rehearing (A-62); are included in the Appendix to this Petition.

Jurisdictional Statement

The order sought to be reviewed was entered on March 13, 2002 (A-62). The statutory provision believed to confer upon this Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. 1254(1).

Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations Involved in the Case

The text of the following constitutional provisions and statutes are provided in the Appendix to this Petition: U.S. Const., amend. 1 (A-65); U.S. Const., Amnd. 14; 28 U.S.C. 1254(1) (A-65); 28 U.S.C. § 1331 (A-65); 28 U.S.C. § 1343 (A-66); 42 U.S.C. § 1981 (A-66); 42 U.S.C. § 1982 (A-67); and, 42 U.S.C. § 1983 (A-67).

Statement of the Case

This case was first filed in the United States District Court for the Middle District of Florida. The basis for federal jurisdiction in the District Court is under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The District Court granted Defendants/Respondents Acadia and Wells Fargo's Rule 12(b)(6) Motions to Dismiss Plaintiffs/Petitioners Helen and Christopher Edwards' claims for violation of their First Amendment rights of free association, violation of their Fourteenth Amendment rights of Equal Protection, conspiracy under 42 U.S.C. § 1985(3), and refusal or failure to prevent conspiracy under 42 U.S.C. § 1986. The Motions to Dismiss were denied as to the remaining counts under 42 U.S.C. § 1981 and under the First Amendment regarding the Edwardses' free speech rights.

On March 9, 2001, the District Court entered summary judgment against the Edwardses, denying the Edwardses' Rule 56 Motions for Partial Summary Judgment and granting Acadia's and Wells Fargo's Rule 56 cross Motions for Summary Judgment on the remaining claims under 42 U.S.C. § 1981 and under the First Amendment regarding the Edwardses' free speech rights. The Edwardses moved to alter or amend judgment, which motion was denied on April 17, 2001.

Thereafter, notice for an appeal to the United States Court of Appeals for the Eleventh Circuit was timely filed on May 14, 2001. The case was fully briefed and argued before a panel of three judges of the Eleventh Circuit. On January 4, 2002, that panel entered an order affirming all of the District Court's rulings. The Edwardses then timely filed a Petition for Rehearing En Banc, which was denied by an order dated March 13, 2002. This Petition is being timely filed within 90 days of the entry of that order.

Statement of Facts

At all times relevant, Petitioners Helen and Christopher Edwards are white people married to each other.[1] (R4-111-23; R4-112-122; R4-112-175,176; R3-57-2.) On November 20, 1998, the Edwardses went to Searstown Mall in their hometown of Titusville, Florida. (R3-57-3; R4-108-6.) The Edwardses were quietly sitting on a bench in the common area of the Mall in front of the Mall's movie theater. (R4-105-7:19-25; R1-2-1; R4-101-1; R4-101-1.) A local physician, Dr. Juan Perez, was sitting near the Edwardses. (R1-2-1.) The Edwardses and Dr. Perez, unacquainted with each other at the time, were each waiting for their respective children to emerge from the movie theater. (R4-105-7:19-25; R1-2-1; R4-101-2; R4-102-2.)

At all times relevant, Appellee Wells Fargo contracted with the owners of Searstown Mall to provide security guards for the Mall. (R4-103-53:3-55:19.) Andrew Bankowski was one of the Wells Fargo employees assigned to provide security at the Mall. (R4-105-6:1-6.) Part of his duties included providing security for the State of Florida

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[1]Mrs. Edwards also is of Cherokee ancestry, but that ancestry is irrelevant to this case. (R4-112-175,176.)

unemployment office located inside the Mall. (R4-105-39:24-40:12.)

While waiting, Dr. Perez and the Edwardses witnessed Wells Fargo security guard Bankowski brusquely accost and harass two different groups of African-American children, (R4-108-66:3-67:1; R4-111-44:20-46:20; R4-111-203:15-25), which culminated in the guard rudely marching a group of five well-behaved African-American girls (ranging in age from about five to about fourteen), out of the Mall and saying to them, "I've told you to get your black asses out of the mall." (R4-111-203:15-25.) The girls had been patronizing commercial establishments in the Mall and had made purchases in the Mall. (R4-108-46.)

The Edwardses witnessed that the security guard was not harassing groups of caucasian children in the Mall, even though those children exhibited the same or worse behavior than the African-American children, and even though the guards were present and observed the behavior of the white children. (R4-111-106:6-13, 192:2-12; R8-230-1-2; R8-231-1-2; R4-101-2; R4-102-2; R1-2-2.) The Edwardses were certain that the Mall security guards were unlawfully discriminating against the black children because of the Negro race of those children, which the Edwardses opposed and by which they were offended. (R8-230-2; R8-231-2; R4-101-2; R4-102-2; R4-101-2; R4-102-2.) As Bankowski was walking past Mrs. Edwards, Mrs. Edwards stated to Bankowski that he should stop discriminating against the black children. (R4-101-3; R4-102-3; R4-105-8:1-3.)

After Mrs. Edwards made her statement to Bankowski, he stalked up to Mrs. Edwards in a threatening manner and told her, "Shut your mouth" or "Shut up." (R1-2-2; R4-101-3; R4-102-3.) Bankowski then drew his long, heavy Maglight flashlight from a loop on his belt and brandished it near Mrs. Edwards in a way that Mr. and Mrs. Edwards perceived as threatening to Mrs. Edwards.

(R4-101-3; R4-102-3; R4-105-8:13-19, 11:1-9.) Mr. Edwards asked Bankowski if Bankowski was threatening Mrs. Edwards. (R4-105-11:7-9; R4-101-3; R4-102-3.) Bankowski responded in the negative, and Mr. Edwards quietly resumed his seat on the bench. (R4-101-3; R4-102-3.) Mr. Edwards said nothing else to Bankowski (or the other security guard) at any other time. (R4-105-9:19-22, 11:1-19; R4-101-3; R4-102-3.)

Bankowski was angered because Mrs. Edwards insinuated or said that he was racist. (R4-105-9:2-5, 16:4-12.) He told the Edwardses to leave the Mall, and he called the police to have them "trespassed" (officially banned) from the Mall because he felt that Mrs. Edwards would not listen to his explanation of why he was making the black girls leave the Mall. (R1-2-2; R4-101-3; R4-102-3; R4-105-8:19-9:2, 10:1-13.) Bankowski thought Mrs. Edwards was sincere in her opposition to what she perceived as racial discrimination. (R4-105-15:9-16:25.)

Dr. Perez observed that Bankowski acted belligerently and rudely, without cause or provocation, toward the black girls and toward Mr. and Mrs. Edwards. (R1-2-2.) At all times relevant, Mr. and Mrs. Edwards acted properly and peacefully. (R1-2-2; R4-101-3; R4-102-3.) It was apparent to anyone who observed Bankowski that he was acting in a hostile manner toward Mr. and Mrs. Edwards because of their opposition to and objections to the racial discrimination against the black girls by Bankowski. (R1-2-3; R4-101-3; R4-102-3.)

When the police officers arrived at Searstown Mall to "trespass" the Edwardses, both of the Edwardses explained to the officers that Bankowski wanted them trespassed because Mrs. Edwards had voiced opposition to racial discrimination against the young black girls. (R4-101-4; R4-102-4.) Both of the Edwardses objected to the police officers about Bankowski's discrimination against the black children and opposed the trespassing of themselves.

(R4-101-4; R4-102-4) Even though the group of young black girls was standing nearby, the police officers refused to speak to the young girls to confirm the Edwardses' story. (R4-101-4; R4-102-4.)

While the Edwardses' children and other people watched, the City of Titusville police officers "trespassed"; i.e., officially banned; the Edwardses from the Mall for two years. (R4-101-4; R4-102-4.) The policy and practice of the City of Titusville is to trespass *everyone* who a property owner or the owner's representative asks to be trespassed. (R4-101-7; R4-102-7.)

Wells Fargo management and Debra Hardy, the Mall manager, knew of the trespassing of the Edwardses within a few days of its occurrence. (R4-105-17:13-18:18, 36:1-15; R4-103-79:1-11.) At all times relevant, Ms. Hardy continuously was the manager of the Mall. (R4-103-31:14-32:6, 53:24-55:19.)

Hardy had the authority from the Mall owners to make all day-to-day, operational decisions for the Mall owners, including decisions about whether to request execution or recision of trespasses of Mall customers. (R4-103-64:22-65:16; R4-104-15:4-16:4, 20:11-21:9.) Acadia, through Hardy, delegated the authority and responsibility to Bankowski for rescinding the trespass order against the Edwardses. (R4-103-65:19-66:10, 81:17-25, 87:2-11.) Despite pleas from the Edwardses and others on behalf of the Edwardses beginning as early as November or December, 1998, Hardy and Bankowski failed to rescind the trespass order against the Edwardses. (R4-112-128:9-129:10; R4-103-8:2-10, 79:15-80:25, 86:21-87:5; R4-101-4; R4-102-4.) Hardy told Mr. Edwards that she did not want to hear the reasons why Mr. Edwards should not have been trespassed by a racist security guard and that she backed her security guards "one hundred per cent." (R4-109-179:16-180:6.) When the trespass order was not rescinded pursuant to the repeated requests to do so,

the Edwardses filed this lawsuit. (R4-103-11:3-10; R4-101-4; R4-102-4.) Within a week or so of the filing of this lawsuit, Acadia's successor owner of the Mall, Searstown Mall Association, Inc., (SMA) and the City of Titusville rescinded the trespass order. (R4-100-4, Ex. 6; R4-101-4; R4-102-4.) As a result of the trespassing, the Edwardses were injured and suffered substantial economic and emotional distress damages. (R3-57-7.)

Argument and Authorities

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH OTHER CIRCUIT COURT'S HOLDINGS IN ANALOGOUS CONTEXTS THAT REASONABLE, GOOD-FAITH OPPOSITION TO RACIAL DISCRIMINATION IS PROTECTED FROM RETALIATION, EVEN IF SUCH BELIEF IS MISTAKEN.

This Court should grant certiorari to review this case because, as explained in more detail throughout this Petition, the Eleventh Circuit has entered a decision in conflict with the decision of other United States courts of appeals on the same important matters, has decided important questions of federal law that have not been, but should be, settled by this Court, and/or has decided important federal questions in ways that conflict with relevant decisions of this Court. Furthermore, the fragmentary and dated jurisprudence regarding retaliation against people who oppose discrimination in places of public accommodation is in desperate need of comprehensive guidance from this Court.

The facts of this case make it plain that a reasonable jury could find that Petitioners had a reasonable, good-faith belief that the activity they were witnessing was intentional racial discrimination

and that they were banished from the Mall for their opposition thereto. In all United States Courts of Appeal that have addressed the issue of retaliation for opposing unlawful discrimination in the employment context, it is black-letter law that reasonable, good-faith opposition to racial discrimination is protected from retaliation under Title VII and Section 1981, even if such belief were to be mistaken.[2] A typical holding reads: "Under Title VII, it is well established that an employee need not prove the underlying claim of discrimination in order to establish a retaliation claim. Instead, an employee's opposition to the discrimination is protected if she can reasonably form a good faith belief that the alleged discrimination existed." *Taylor v. Runyon*, 175 F.3d 861, 869 (11th Cir. 1999) (citation omitted); *accord Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261-62 (1st Cir. 1999); *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990)); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 357 n. 1 (4th Cir. 1985), *overruled on other grounds*, 490 U.S. 228 (1989); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1004-07 (5th Cir. 1969); *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000); *Buettner v. Arch Coal Sales Co., Inc.*, 216 F.3d 707, 714 (8th Cir. 2000); *Trent v. Valley Electric Assn. Inc.*, 41 F.3d 524, 526 (9th Cir. 1994); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984); *compare Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001) (refraining from ruling on the propriety of the Ninth Circuit's

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2Both Title VII and Section 1981 "have the same requirements of proof and use the same analytical framework...." *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998).

interpretation that opposition was protected under 42 U.S.C. § 2000e-3(a) "if she had a reasonable, good faith belief that the incident involving the sexually explicit remark constituted unlawful sexual harassment"). The employment standard of reasonable good faith should apply with as much or more force in a shopping mall that is a place of public accommodation where people have a right to be regardless of race or other protected status. Here, the Eleventh Circuit Court of Appeals has entered a decision in conflict with the decisions of other United States courts of appeals on the essentially identical important matter. The instant case presents the need and opportunity for this Honorable Court to clearly and unambiguously establish that extremely important matter in accordance with public policy and legislative intent.

Furthermore, insofar as this issue has not been decided in the context of a place of public accommodation, the Eleventh Circuit has decided this important question of federal law that has not been, but should be, settled by this Court. However, based on rulings of this Court that provide protection under § 1981 to a white woman who joined in a lunch-counter sit-in opposing racial discrimination against retaliatory banishment by the business and the police, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150-52 (1970), that provide damages and other relief under § 1982 to a white citizen prohibited from leasing his house and concomitant access to a community swimming pool to a black person, *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), that afford protection to white people under Section 1981, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976), that require labor unions to oppose racial discrimination against their members, *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), that grant standing to litigants who oppose racial discrimination in selection of jurors, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and that provide protection

against retaliation against former employees under Title VII, *Robinson v. Shell Oil Co.*, 519 U.S. 377 (1997), the Eleventh Circuit's ruling is contrary to the reasoning in those cases. Thus, the Eleventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Also, Respondents appear to argue that the "proof-of-intent" requirement under Section 1981 is lacking in this case. However, any "proof-of-intent" requirement under Section 1981 is satisfied if those who suffer retaliation base their opposition on a reasonable, good faith belief that intentional discrimination is occurring. Clarification of this point by this Court is another compelling reason for a grant of certiorari.

Furthermore, it should be pointed out that the errors of the lower courts in this case do not consist of erroneous factual findings or the misapplication of a properly stated rule of law. In the instant case, the standard incorrectly applied by the lower courts is that Petitioners and others who oppose discrimination must first prove that the discrimination is unlawful. In other words, the holding of the lower Courts in this case is that people who are mistaken in their reasonable, good-faith opposition to discrimination are not protected from retaliation. Such a standard is without precedent and is plainly contrary to legislative intent and public policy.

Moreover, even if the no-mistake standard were to apply, as a matter of law the evidence shows that a reasonable jury plainly could find that not only was Petitioners' opposition reasonable and in good-faith, the jury could find that Petitioners were not mistaken in their belief that unlawful racial discrimination was occurring. The Eleventh Circuit erred by ignoring the great weight of evidence in favor of Petitioners and by affirming the District Court's grant of summary judgment in favor of Respondents. Therefore, for all of the foregoing reasons, the matters at issue herein should be addressed by this Court.

II. BECAUSE THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH THE HOLDINGS OF THIS COURT AND OF OTHER CIRCUIT COURTS, THIS COURT SHOULD GRANT CERTIORARI TO OVERTURN THE LAW OF THE ELEVENTH CIRCUIT THAT A WHITE PERSON DOES NOT HAVE STANDING UNDER 42 U.S.C. § 1981 FOR A CLAIM OF RETALIATION FOR OPPOSING RACIAL DISCRIMINATION AGAINST BLACK PEOPLE WHERE THE RETALIATION IS NOT BASED UPON THE WHITE PERSON'S OWN RACE.

Because the Eleventh Circuit did not provide a detailed basis for its ruling in this case, it may have been relying on its own precedent of *Little v. United Technologies*, 103 F.3d 956 (11th Cir. 1997), which held that the white plaintiff had no claim under § 1981 because the retaliation against him was not based upon his own race, but upon his opposition to racially derogatory remarks against black coworkers. *See id.* at 961. However, the ruling in *Little* is completely contrary to the long-established holdings of this Court and of other Circuits that have addressed this issue. *See, e.g., Sullivan v. Little Hunting Park*, 396 U.S. 229, 237 (1969) (holding that a white person who has been "punished for trying to vindicate the rights of non-white minorities" has standing to sue under 42 U.S.C. § 1982); *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979) (holding that housing developer and every other person has an implied right of action under § 1981 against any other person who, with a racially discriminatory intent, interferes with his right to make contracts with non-whites); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 (2d Cir. 1975) (holding that a white man who suffered retaliation for selling his house to a black man had a cause of action under § 1981), *modified on other grounds*, 520 F.2d 409; *Liotta v. National Forge Co.*, 629 F.2d 903,

906-07 (3d Cir. 1980) (holding that summary judgment is inappropriate where material issues of fact remain regarding § 1981 claim brought by plaintiff allegedly discharged because he espoused the rights of company's black employees); *Fiedler v. Marumsco Christian Schl.*, 631 F.2d 1144, 1150 (4th Cir. 1980) (holding that white people had a cause of action under § 1981 for expulsion based on association with a black person); *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111, 114 (5th Cir. 1986) (holding that a white plaintiff maintained a § 1981 claim alleging discrimination because of marriage to a non-white person); *Winston v. Lear-Seigler, Inc.*, 558 F.2d 1266, 1268 (6th Cir. 1977) (reversing summary judgment against a white man who was fired for opposing racial discrimination against a black coworker); *Maynard v. City of San Jose*, 37 F.3d 1396, 1403 (9th Cir. 1994) (holding that a white person who assisted a black person had standing under § 1981); *Patrick v. Miller*, 953 F.2d 1240, 1249-50 (10th Cir. 1992) (holding that a white employee who suffered retaliation for helping a black employee file an anti-discrimination claim had standing under § 1981). Thus, This Court should grant certiorari to overturn the Eleventh Circuit's legally erroneous and socially destructive holding of *Little*.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S RULING CONFLICTS WITH THE RULINGS OF THIS COURT REGARDING WHETHER PRIVATE ENTITY STATE ACTORS SHARE THE SAME IMMUNITIES AS MUNICIPALITIES.

The Eleventh Circuit plainly erred as a matter of law by affirming summary judgment against Petitioners based on a purported lack of evidence of a custom or policy as required by Section 1983. First, no proof of custom or policy should be required to

show vicarious liability of a private entity in the role of state actor. Second, even if such evidence of policy or custom is required, Petitioners have adduced such evidence on the record.

A. No custom or policy need be established to hold liable a private entity in the role of state actor under 42 U.S.C. § 1983.

For the Eleventh Circuit to require a custom or policy to establish the liability of a private entity in the role of state actor decides an important question of federal law that has not been, but should be, settled by this Court. Moreover, the Eleventh Circuit's decision decides an important federal question in a way that conflicts with relevant decisions of this Court. The District Courts in *Taylor v. Plousis*, 101 F. Supp. 2d 255, 264 N. 4 (D. N.J. 2000), and in *Groom v. Safeway Inc.*, 991 F. Supp. 987, 991 n. 3 (W.D. Wa. 1997), have recognized this issue, and the District Court in the instant case deferred consideration of the issue to the Eleventh Circuit. *See Edwards v. Acadia Realty Trust, Inc.*, 141 F. Supp. 2d 1340, 131347 n. 7 (M.D. Fla. 2001).

The current Eleventh Circuit rule is that private entities acting under color of state law are not subject to vicarious liability. *See, e.g., Buckner v. Toro*, 116 F.3d 450 (11th Cir. 1997); *Harvey v. Harvey*, 949 F.2d 1127, 1129-30 (11th Cir. 1992). With all due respect, the rule from *Harvey* and similar cases is an unwarranted and unsupported extension, without thorough analysis, of the policy and custom requirements for municipal liability stated in *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978). In addition, this Court's holding in *Richardson v. McKnight*, 521 U.S. 399 (1997), conflicts with the Eleventh Circuit's decision here because the *Richardson* holding restricts the right of private corporations to share the immunities of municipal corporations.

In *Buckner*, the Eleventh Circuit merely stated that when the private employer "performs a function traditionally within the exclusive prerogative of the state, . . . it becomes the functional equivalent of the municipality." 116 F.3d at 452. Here, the Edwardses do not dispute that some functional equivalency in the provision of the service itself is present, but the important differences between public and private corporations; e.g., profit motive, civil service, competition, and accountability; still remain. *See Richardson*, 521 U.S. at 399. Regarding the instant case, it should be noted that Respondents, two private corporations, act as state actors in only two ways: through contract as landlord and security providers for the government office located in the shopping mall and through enlisting -- even usurping --the police power of the City of Titusville in trespassing the Edwardses. "We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985) (footnote omitted). Here, the voluntary roles played for profit by Respondents as state actors without direct supervision by any governmental entity provide little or no reason to afford Respondents a shield from respondeat superior liability, while the traditional rationales for vicarious liability do apply. *See Monell*, 436 U.S. at 693-94, n.58.

Buckner also states that *Monell* requires that direct liability is "an element of the § 1983 claim." 116 F.3d at 452. However, such analysis ignores the strong distinction between municipal and private corporations made by the United States Supreme Court in *Monell* and *Richardson* that was based on factors other than the limited functional equivalency of the service itself. The *Buckner* Court went on to "reject the notion that the policy or custom requirement imposed by *Monell* may be equated with

qualified immunity." 116 F.3d at 453. However, the *Howell* holding upon which *Buckner* is based appears to base its holding on the same overruled qualified immunity case upon which *Harvey* relies. *See Howell v. Evans*, 922 F.2d 712, 724 (11th Cir. 1991) (citing *Jones v. Preuit & Mauldin*, 851 F.2d 1321 (11th Cir. 1988)). Nevertheless, the qualified immunity doctrine as expressed in *Richardson* is a powerful analogy. *See Taylor*, 101 F. Supp. 2d at 264 n.4; *Groom*, 991 F. Supp. at 991 n.3. Thus, despite the *Buckner* and *Harvey* opinions, a thorough analysis of the history and intent of respondeat superior liability and civil rights laws in general, and of Section 1983 in particular, impel a finding that private corporations are not entitled to the special protection afforded to municipal corporations.

Also, the arguments noted by this Court in *Richardson*, and by the courts in *Taylor* and *Groom* apply with even more force to the instant case in light of Respondents' state action of essentially usurping governmental functions in dictating the actions of the police regarding the trespass order; i.e., that the police had no choice but to do the bidding of the Mall owner in trespassing the Edwardses. "Trespassing," like other self-help actions such as replevin, is essentially a state action by private entities who are denied qualified immunity. *See Wyatt v. Cole*, 504 U.S. 158, 168-69 (1992) (stating that private defendants "faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute" are not entitled to immunity). Thus, even if Respondents are state actors, respondeat superior liability should apply.

Finally, the history and policy considerations that underlie Section 1983, especially the federalism concerns that shield state government entities from respondeat superior liability, either do not apply to private employers or counsel against shielding private employer state actors from vicarious liability. Again, the Eleventh Circuit's error does not consist of

erroneous factual findings or the misapplication of a properly stated rule of law; instead, the Eleventh Circuit has decided an ubiquitously important question of federal law that has not been, but should be, settled by this Court. The Eleventh Circuit has also decided an important federal question in a way that conflicts with relevant decisions of this Court. Therefore, compelling reasons warrant certiorari review of this case by this Court.

B. Petitioners have adduced sufficient evidence to establish Respondents' custom or policy.

Certiorari should be granted on this issue because the Eleventh Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter of establishing policy and custom. Additionally, even if the Eleventh Circuit's error consists of erroneous factual findings or the misapplication of a properly stated rule of law, the error should be rectified because it is intertwined with the Eleventh Circuit's other decisions on the § 1983 claims that are erroneous under United States Supreme Court Rule 10(a) and 10(c).

As a preliminary step to determining that evidence of a custom or policy exists, it may be useful to describe the basis for establishing that Respondents Acadia and Wells Fargo are state actors.[3] Respondents are state actors under two tests: the public function test and the nexus/joint action test. Respondents are state actors under the

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3Whether or not Acadia and Wells Fargo were state actors is relevant only to the First Amendment count under section 1983 because claims under 42 U.S.C. § 1981 do not require state action.

public function test because they are acting as gatekeeper and guard to a State of Florida unemployment benefits office. The First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, including on action by the owner of private property partially used for public purposes. See *Lloyd Corporation, Ltd., v. Tanner*, 407 U.S. 551, 567 (1972) (holding that a shopping center owner is not a state actor when the shopping center is used for private purposes only). Here, because the public State of Florida unemployment office is located at the Mall, the Mall is a public forum, subject only to reasonable time, place, and manner restrictions. Here, Respondents trespassed the Edwardses from the vicinity of a government office based on the content of the Edwardses' speech and association; i.e., Respondents impermissibly trespassed the Edwardses because the Edwardses expressed their opposition to racial discrimination, insinuated that Bankowski was a racist, and refused to listen to his "explanation." Therefore, Wells Fargo and Acadia are state actors under the public function test.

Acadia and Wells Fargo also are state actors under the nexus/joint action test because the City of Titusville government so far insinuated itself into a position of interdependence with Respondents that the City was a joint participant in the enterprise. *See American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. 40 (1999); *Perkins v. Londonderry Basketball Club*, 196 F.3d 13 (1st Cir. 1999); *Disabled in Action of Metropolitan New York v. Hammonds*, 202 F.3d 110 (2d Cir. 2000); *Goldstein v. Chestnut Ridge Vol Fire Co.*, 218 F.3d 337 (4th Cir. 2000); *Lansing v. City of Memphis*, 202 F.3d 821 (6th Cir. 2000); *Messman v Helmke*, 133 F.3d 1042 (7th Cir. 1998); *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227 (9th Cir. 1996). For instance, the evidence shows contacts among and between Acadia, Wells Fargo, and the City of Titusville that could prove the

actors reached an understanding to violate Petitioners' rights. *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (holding that willful participation in joint action with the State or its agents constitutes state action).

Also, Petitioners show that an agreement existed regarding Wells Fargo and the police and that Wells Fargo had a major part in the original "trespassing" of Petitioners. The police officers were activated by a municipal policy and custom to automatically implement and enforce the demands of property owners and the agents of property owners to eject and banish people from those owners' property. Thus, the evidence shows that Wells Fargo and Acadia were acting under color of state law also because they are jointly engaged with City of Titusville police officers in the actions against the Edwardses.

Under either or both theories of state action, Acadia and Wells Fargo had a policy, custom, and practice resulting in the violation of Petitioners' rights: Hardy and Bankowski were delegated the authority to set and implement trespassing policy by Acadia; Acadia delegated all responsibility for Mall management, including the trespassing of customers, to Hardy; and, Acadia's policies are delegated to Bankowski, as shown by the "one hundred per cent" backing and ratification by Hardy of Bankowski's trespassing and all other activities, even though the Edwardses attempted to notify Hardy that the trespassing was due to their speaking out regarding unlawful racial discrimination. In fact, the only arguably non-racism "policy" of Wells Fargo is its mild admonitions for its employees not to discriminate against each other. Besides, a single or initial incident can provide evidence of a custom or policy, particularly if the Appellee is negligent about training and/or supervising to prevent the violation of rights. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 380 (1989). Here, the evidence is unrefuted that neither

Hardy nor Bankowski received training regarding opposition to unlawful discrimination or other practices, even in time to rescind the Edwardses' banishment before the lawsuit was filed; and, no training was given regarding direct racial discrimination against mall customers. Therefore, for all of the foregoing reasons, custom and policy evidence exists, even if it were necessary to establish liability for a private corporation in the role of state actor; and, the Eleventh Circuit's affirmation conflicts with relevant case law from this Court and from other Courts of Appeal.

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DISMISSAL OF PETITIONERS' FREE ASSOCIATION CLAIMS UNDER THE FIRST AMENDMENT AND 42 U.S.C. § 1983 CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT; OR, ALTERNATIVELY, THE ELEVENTH CIRCUIT HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW REGARDING FIRST AMENDMENT RIGHTS OF FREE ASSOCIATION THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Eleventh Circuit has decided important federal questions regarding First Amendment rights of intimate and expressive association in a way that conflicts with relevant decisions of this Court; or, alternatively, the Eleventh Circuit has decided important questions of federal law regarding First Amendment rights of free association that have not been, but should be, settled by this Court. The Edwardses adequately allege a violation of their rights of free association because, inter alia, the relatively quiet Mr. Edwards could be found to have been banished from the Mall solely because of his intimate association with his wife, who voiced her opposition

to discrimination; and, Respondents associated Mr. Edwards with his wife. Also, the Respondents associated Mrs. Edwards with her husband, who was trespassed because he stood up to Bankowski and the police regarding the retaliation against himself and Mrs. Edwards. Hence, the Edwardses allege that Respondents subjected each of the Edwardses to punishment, pains, penalties, and exactions; e.g., ejection, banishment, and the concomitant injuries suffered by the Edwardses; unlike those to which white persons were subjected by Respondents because of Respondents' violative actions taken against each of the Edwardses, as each of the Edwardses was accompanied by and associated with the other. (R3-57-6, Par. 23.) In so stating, the Third Amended Complaint alleges that the Edwardses' association with each other is a constitutionally protected intimate relationship. The right of intimate association encompasses the personal relationships that attend the creation and sustenance of a family, including marriage. *See Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984).

Also, the Edwardses adequately alleged that they were associating with the black children for the purpose of expressing their First Amendment rights.

Expressive association concerns the freedom to associate for the purpose of engaging in activities protected by the First Amendment. *See id.* at 617-18. Mrs. Edwards can obtain protection for an asserted associational right if she can demonstrate either that the asserted association closely enough resembles a family relationship to be protected by the right to intimate association, or that the purpose of the association is to engage in activities independently protected by the First Amendment. *See id.* The Edwardses were trespassed because of their anti-discrimination association with the black children when the black children communicated with the Edwardses and the Edwardses took the side of the black children. It was not necessary for the

Edwardses to have spoken with the black children or that the black children became aware of the Edwardses' actions. It is enough, as contained in the Third Amended Complaint, that the Edwardses spoke out on behalf of the black children and that the Edwardses' opposition to discrimination, in the minds of the security guards, the Mall manager, and by Respondents, associated the Edwardses with people of color. (R3-57-4, Par. 16.) Similarly, the Third Amended Complaint alleges that Respondents subjected each of the Edwardses to punishment, pains, penalties, and exactions; e.g., ejection, banishment and the concomitant injuries suffered by the Edwardses; unlike those to which white persons were subjected by Respondents because of Respondents' violative actions taken against each of the Edwardses, as each of the Edwardses was associated with people of color. (R3-57-6, Par. 23.) The Edwardses also allege that at all times relevant, Respondents acted toward the Edwardses because of the Respondents' association of the Edwardses with people of color. (R3-57-9, Par. 41.) Thus, the Edwardses clearly allege that they were associating with the black children for the purpose of expressing the Edwardses' First Amendment rights. Thus, the Edwardses adequately allege a violation of their rights of expressive association with the black children.

Additionally, a single association may coincide and possess both intimate and expressive features and, therefore, fall within the scope of not only the right of intimate association but also the right to expressive association." *Id.* at 618. Clearly, under the liberal standards of notice pleading, the Edwardses have alleged claims of violations of their rights of both intimate and expressive association. Therefore, because the Eleventh Circuit has decided important federal questions regarding First Amendment rights of intimate and expressive association in a way that conflicts with relevant decisions of this Court; or, alternatively, because the Eleventh Circuit has

decided important questions of federal law regarding First Amendment rights of free association that have not been, but should be, settled by this Court, this Court should grant review of this case.

V. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT IN DISMISSING PETITIONERS' EQUAL PROTECTION CLAIMS.

In affirming the dismissal of the Equal Protection claims, the Eleventh Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Here, the District Court states, "Plaintiffs have not alleged that others who were similarly situated were treated differently than Plaintiffs." However, the Edwardses allege that Respondents' conduct deprived them of the rights, privileges, or immunities secured by the Constitution or laws of the United States through the Fourteenth Amendment and that are enjoyed by white people -- particularly by white people who do not oppose unlawful racial discrimination. (R3-57-11.) Also, the Edwardses allege that Respondents subjected each of them to punishment, pains, penalties, and exactions; e.g., ejection, banishment and the concomitant injuries suffered by Petitioners; unlike those to which white persons -- particularly white persons who do not oppose unlawful racial discrimination -- were subjected by Respondents because of Respondents' violative actions taken against each of the Edwardses, as each of the Edwardses was accompanied by and associated with the other; and, as each of the Edwardses associated with people of color. (R3-57-13.) Here, the proper comparator to the Edwardses for Equal Protection purposes are people such as Dr. Perez; as alleged in the Third Amended Complaint, a white patron of the

Mall who witnessed the discrimination but did not oppose the discrimination in a way apparent to the discriminator. Dr. Perez, of course, was not subjected to the humiliating and costly banishment from the Mall.

Also, the Edwardses allege racially discriminatory animus when they state that they are denied by all Respondents the full and equal enjoyment of the benefits of the Mall because of their opposition to the discrimination or segregation of the black children on the basis of the race and/or color of the black children, and because of Respondents' animus thereto. (R3-57-11.) Thus, the Edwardses adequately allege their Equal Protection claim and certiorari should be granted to address this issue.

Conclusion

Because of the high value placed on people who legitimately oppose unlawful discrimination, because of the ubiquity and sacredness of free speech and of spousal association, because of the far-reaching injustice and inequity of allowing private employers to evade accountability behind the municipal standard of custom or policy, and because of the drastic and unwanted consequences to those and other relationships that are likely to occur if the Eleventh Circuit Court of Appeals' affirmance of the District Court's decisions that conflict with decisions of this Court and of other Courts of Appeal and/or that decide important questions of law that should be decided by this Court are to stand, this Honorable Court should grant Petitioners Petition for Writ of Certiorari.

Respectfully submitted,

Mark E. Tietig
Counsel of Record

Lisa Kuhlman Tietig
Co-Counsel of Record

Tietig & Tietig, P.A.
6065 S. Tropical Trail
Merritt Island, FL 32952
(321) 452-9944

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